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In The

Supreme Court of the United States

October Term, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

DO THE RESPONDENTS HAVE A SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A TRIAL BY JURY WHEN THEY SEEK BACKPAY AND OTHER COMPENSATORY DAMAGES RESULTING FROM A UNION'S ALLEGED BREACH OF DUTY OF FAIR REPRESENTATION UNDER A STATUTE SILENT AS TO HOW THE REMEDY OUGHT TO BE CHARACTERIZED?

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STATEMENT OF THE CASE

The respondents in this case are truckdrivers who are present and former employees of McLean Trucking Co., (hereinafter "the employer"), a former defendant in this case. The respondents are also present and former members of the petitioner. This case arises out of a change of operations which was implemented by the employer from July to October, 1982. The change of operations involved an alteration of the previous shipping patterns, resulting in the elimination of some of the employer's terminals and a re-organization of other terminals. The number of drivers at some terminals of the employer was increased, and the number at other terminals was decreased to accommodate the shipping changes. Pursuant to the change of operations, 62 truckdrivers were added to the employer's Winston-Salem terminal. (J.A. 25-31).

On or about October 10, 1982, the respondents and others transferred to the Winston-Salem terminal of the employer from various other terminals throughout the country. Upon the theory that transferring active drivers from other domiciles were entitled to follow their freight, a procedure was established whereby these drivers were accorded special seniority rights over senior laid-off drivers in the domicile to which they were transferring. These special seniority rights were to prevail under the procedure until the laid-off drivers were recalled for new work, at which time they would "dovetail" or assume their proper seniority positions. When the respondents transferred to the Winston-Salem terminal of the employer, they established their membership with the petitioner. (J.A. 30-31).

Following their transfer to Winston-Salem, the respondents worked on active status for approximately six weeks. On November 23, 1982, the employer laid off 30 drivers, including many of the respondents. The respondents complained to the petitioner and filed a grievance on December 3, 1982. For the next month prior to the hearing on the grievance, the employer had several recalls and layoffs in Winston-Salem. On each occasion the employer took the position that as soon as a transferee driver was laid off, he lost all special seniority rights which he had acquired under the change of operations procedure. (J.A. 9-10, 31-2).

In January, 1983, the respondents' grievance concerning the order and priority of the layoffs and recalls was heard, first by the Carolina Bi-State Committee on January 12, and finally by the Eastern Conference Joint Area Committee on January 24, 1983. At each of these hearings, the business agent of the petitioner stated that he was taking a neutral position in regard to the respondents' grievance. Among the issues considered at each hearing was the question of the order of recalls after the initial layoff of transferee drivers. The employer, with the agreement of the petitioner, took the position that following a layoff, the transferee drivers lost their special seniority rights and dovetailed into their regular seniority positions in relation to the Winston-Salem drivers who had been inactive at the time of the initial change (hereinafter "Winston-Salem inactive drivers"). According to this interpretation, when a recall was effected, the senior Winston-Salem inactive drivers were the first drivers called back to work, and the transferee drivers, who had moved themselves and their families to Winston-Salem,

remained laid-off after only six weeks of work. (J.A. 9, 32).

The grieving respondents took the position that under the change of operations procedure they should maintain their special seniority until the Winston-Salem inactive drivers were recalled for regular work, at which time they would dovetail into the active board. At the conclusion of the hearing before the Carolina Bi-State Committee, the committee referred the case to the Eastern Conference Joint Area Committee. Following a hearing in Arlington, Virginia, the committee decided this issue in favor of the grieving respondents. Specifically, the committee ordered that the transferee drivers, including the respondents who were laid off after the change of operations was implemented in October, 1982, should be immediately recalled; that the Winston-Salem drivers who had been inactive at the time of the change should be laid off; and that the transferee drivers would maintain their special seniority rights until such time as the former Winston-Salem inactive drivers were recalled for regular work. (J.A. 32).

Following the decision of the grievance committee, the employer recalled the respondents and other transferee drivers. On February 7, 1983, the employer laid off the 30 former Winston-Salem inactive drivers who had been on the inactive list as of October 10, 1982. However, on February 8, 1983, all 30 former Winston-Salem inactive drivers who had been laid off the previous day were called back to work. The effect of this action by the employer was to permit the Winston-Salem inactive drivers to regain their places on the active list ahead of transferee drivers, including the respondents. As a result

of this action on the part of the employer, the respondents and other transferee drivers were placed in precisely the same position as they had occupied immediately prior to the decision which had been rendered in their favor. On February 26, 1983, twenty transferee drivers, including some of the respondents, were again laid off. (J.A. 35-6).

On March 1, 1983, some of the laid-off transferee drivers, including some of the respondents, filed a grievance contending that the actions of the employer in recalling the former Winston-Salem drivers constituted a "subterfuge" of the decision of the Eastern Conference Joint Area Committee of January 24, 1983. At that time, the representative of the petitioner appeared before the committee. After reciting the contentions of the grievants, as well as the contentions of the Winston-Salem inactive drivers, the representative took no further action in the hearing. He failed to present any evidence in connection with the grievance. At the conclusion of the hearing, the committee ruled that the actions of the employer were proper and did not violate the decision of January 24, 1983.[1] (J.A. 36-7).

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[1] In the Statement of the Case of the petitioner's brief, the petitioner refers to the grievance committee which heard the respondents' grievances as an "arbitration panel." Brief of Petitioner, p. 4. In fact, under the Supplemental Agreement which governed grievances of the parties in 1983, there were two committees established to hear grievances at the first and second levels. Each committee was composed of members appointed by employers and unions subject to the agreement. The first committee was designated the Joint Bi-State Area Committee, and if this committee decided a case, then there

(Continued on following page)

Subsequently, there were periodic layoffs and recalls affecting the transferee drivers. Most of the respondents experienced long periods of layoff thereafter, until January, 1986, when the employer filed for bankruptcy.

The respondents instituted this action on July 25, 1983. In their Complaint and Amended Complaint they have alleged that the employer violated their rights under their collective bargaining agreement, change of operations procedure, and decisions of the grievance committees in implementing layoffs and recalls at the Winston-Salem terminal; and that the petitioner breached its duty of fair representation in representing the respondents in connection with their complaints and grievances. (J.A. 25). In their pleadings, the respondents properly demanded a trial by jury on all issues presented pursuant

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(Continued from previous page)

was no further right to appeal. The next level committee was designated the Eastern Conference Joint Area Committee which heard all cases which the Joint Bi-State Area Committee was unable to decide. (J.A. 32, 51-3, 72-3).

In the present case, the first set of grievances filed by the respondents were heard initially by the Joint Bi-State Area Committee, and then referred to the Eastern Conference Joint Area Committee for a final decision. *Id.* The second set of grievances filed by the respondents were heard and decided by the Joint Bi-State Area Committee. At no time were any of these grievances heard by an impartial arbitrator.

In its Brief *Amicus Curiae* filed in support of the respondents, the Teamsters for a Democratic Union have argued this point as an additional basis for preserving the respondents' rights to a jury trial. *See* Brief for Teamsters For a Democratic Union as *Amicus Curiae* Urging Affirmance. The respondents endorse this argument in full.

to Rule 38(b) of the Federal Rules of Civil Procedure. F.R.C.P., Rule 38(b) (J.A. 42). After extensive discovery in the case, the petitioner, as well as the other defendants at that time filed motions for summary judgment. On July 5, 1985, the District Court denied the motions for summary judgment filed by the petitioner and the employer. Thereafter, the employer filed for bankruptcy, and all proceedings with regard to that defendant were stayed; and subsequently, the action against the employer was voluntarily dismissed.

The petitioner filed its Motion to Strike Jury Trial Demand on January 6, 1986. (J.A. 76). On November 10, 1987, the United States District Court denied the petitioner's motion, finding that the Seventh Amendment to the United States Constitution entitled the respondents to a trial by jury on the issues presented in this action. *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 676 F.Supp. 659 (M.D.N.C. 1987); Petition Appendix (hereinafter "Pet.App.") A1. In its Order the court certified the issue for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) (1982) (J.A. 78); and on December 17, 1987, the United States Court of Appeals for the Fourth Circuit granted permission for appeal. (Pet.App. A30). On December 20, 1988, the Court of Appeals filed its opinion upholding the trial court, finding "no functional justification for denying the plaintiffs' Constitutional rights to a jury trial." *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 863 F.2d 334, 339 (4th Cir. 1988); Pet.App. A50. On April 18, 1989, the petitioner filed its Petition for Writ of Certiorari, which was granted by this Court on June 19, 1989.

SUMMARY OF ARGUMENT

The Seventh Amendment guarantees a trial by jury for litigants in all "suits at common law, where the value in controversy shall exceed twenty dollars ($20.00)." This constitutional provision has been construed by the most recent cases of this Court to include statutory actions or any other actions presenting legal issues or requesting legal relief. *Curtis v. Loether*, 415 U.S. 189 (1974). In determining whether issues are legal or equitable, this Court has made it clear that neither the procedural form of the action nor an overall characterization of the action should be dispositive. *Ross v. Bernhard*, 396 U.S. 531 (1970). In addition, where there are mixed issues of law and equity, the legal issues must be tried to a jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

In *Ross*, the Court articulated a three-part test which can be applied to the present case.

(a) Under the first prong, the pre-merger custom with respect to the issues should be considered. Since an action for breach of duty of fair representation (hereinafter "Section 301" action)[2] is a statutory claim, established by the Court, there is no precise analogy to any common law or equitable form of action. However, in *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court determined that the specific issues to be decided in any Section 301 case are (1)

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[2] Section 301 of the Labor Management Relations Act of 1947, *as amended*, 29 U.S.C. Sec. 185. This action is referred to by the courts as a "Section 301" action, "duty of fair representation action" (DFR), or "hybrid Sec. 301-fair representation" action. For convenience, all such actions which are instituted under Section 301 are referred to herein as Section 301 actions, unless otherwise specified.

whether the union has breached its duty of fair representation to the members; and (2) whether the company has breached its contract or collective bargaining agreement. This Court has since recognized that these issues include common law tort and contract components. *Id.;* and *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983). In the factual context of this case, the Section 301 claim is most closely analogous to a legal malpractice action, which is rooted in the common law. R.E. Mallen and J.M. Smith, *Legal Malpractice,* Vol. I, Ch. 1 (3rd Ed. 1989).

The petitioner compares Section 301 actions to trust actions and actions to set aside arbitration awards, which are based on equitable principles; and argues on the basis of these comparisons that Section 301 claims are equitable in nature, and should be tried by the court. However, the petitioner's comparisons have not been employed by the Court in deciding other issues in Section 301 actions and should not be dispositive of the Seventh Amendment issue in this case. In *Beacon Theatres* and its progeny, this Court emphatically stated that the specific issues to be decided, and not the overall characterization of the action, determine the Seventh Amendment question. Under *Vaca,* the specific issues to be decided in Section 301 actions resemble common law theories.

(b) Under the second prong of the *Ross* test, the nature of specific relief requested must be considered. In this case, the respondents requested monetary damages for backpay and other lost employment benefits, as well as reinstatement and other injunctive and declaratory relief. Since the company is bankrupt, reinstatement and

other equitable relief is no longer possible. Thus, the primary relief still available is compensatory damages.

Historically, monetary damages as compensation was the principal form of relief at common law. Generally, equitable courts did not award monetary damages, except as incidental to equitable actions. J. Story, *Commentaries on Equity Jurisprudence,* Vol. II, Sec. 794 (6th Ed. 1853).

This Court has approved the award of compensatory damages including backpay, in Section 301 actions; and has implied that such damages are a form of legal relief, which follow as a matter of right from proof of the wrongs committed by the union and company. *Bowen v. United States Postal Service,* 459 U.S. 212 (1983).

Section 301 is silent with respect to damages or other types of relief. For this reason, it is distinguishable from Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. Sec. 2000e *et seq.*, and other statutes where Congress expressly provided for equitable remedies. Moreover, there is no policy which calls for the elimination of jury trials in Section 301 actions.

In common law tort and contract actions, backpay is generally considered legal relief. The common law treatment of backpay and monetary damages applies to Section 301 actions.

Finally, the relief requested in this case does not have the characteristics of traditionally equitable relief. Based on *Vaca* and *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979), such relief is not discretionary with the court, but follows as a matter of right upon proof of the wrong. Moreover, the monetary relief requested in

this case is clearly not incidental to reinstatement, since reinstatement is no longer available. Finally, backpay is not restitutionary in the context of this case. *Curtis*, 415 U.S. 189.

(c) Under the third prong of the *Ross* test (which has not been mentioned in this Court's recent opinions), the jury has the ability to determine the issues in this case, particularly since the issues of liability and damages have been bifurcated by the district court. (J.A. 78).

Thus, based on *Ross* and other Seventh Amendment cases, the respondents have a right to a jury trial in this Section 301 action. Individual rights to jury trials in Section 301 cases have been upheld, not only by the courts in this case, but by most of the circuit courts which have decided the issue. *See, e.g., Quinn v. DiGiulian*, 739 F.2d 637 (D.C.Cir. 1984).

ARGUMENT

THE RESPONDENTS ARE ENTITLED TO A JURY TRIAL OF THE ISSUES PRESENTED IN THEIR ACTION

A. THE SEVENTH AMENDMENT GUARANTEES THE RIGHT TO A TRIAL BY JURY

The Seventh Amendment to the United States Constitution guarantees to litigants a trial by jury "[in] suits at common law, where the value in controversy shall exceed twenty dollars ($20.00)." In its argument, the petitioner contends that this constitutional right is not applicable to the respondents' action, and therefore, the lower court decisions upholding the respondents' rights should be

reversed. Recent Supreme Court decisions broadly construing the Seventh Amendment in its application under the Federal Rules of Civil Procedure, and specific authority in the lower federal courts applying these principles in fair representation cases, support the respondents' rights to a jury trial in this action.[3] Accordingly, the decision of the Court of Appeals for the Fourth Circuit upholding the respondents' constitutional rights should be affirmed.

1. When Litigants Press Legal and Equitable Claims, the Seventh Amendment Protects the Right to trial by Jury

Since the enactment of the Federal Rules of Civil Procedure, the United States Supreme Court, recognizing the relative flexibility of our merged system of law and equity, has consistently supported the constitutional right to a trial by jury under the Seventh Amendment. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), the Court considered the issue in an action for a declaratory judgment. The plaintiff, who operated a movie theatre

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[3] *See, e.g., Minnis v. International Union*, 531 F.2d 850 (8th Cir. 1975); *Cox v. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979); *Roscello v. Southwest Airlines*, 726 F.2d 217 (5th Cir. 1984); *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984); *United Transportation Union, Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282 (6th Cir., 1989); *Cook v. National Maritime Union of America*, 617 F.Supp. 1052 (S.D.N.Y. 1985); *Palmer v. Metro-North Commuter R.Co.*, 661 F.Supp. 1178 (S.D.N.Y. 1987); *White v. Anchor Motor Freight, Inc.*, 683 F.Supp. 1177 (W.D.Mich. 1988); *Woods v. Dunlop Tire Co.*, 673 F.Supp. 117 (W.D.N.Y. 1987); *Grider v. Monin*, 637 F.Supp. 324 (M.D.Tenn. 1986); *Contra, Leach v. Pan American World Airways*, 842 F.2d 285, 288 (11th Cir. 1988).

and allegedly had the exclusive right to show "first run" movies in the area, was accused of antitrust violations based on its contract and threatened with legal action by the defendant. The plaintiff, contending that the threats of legal action constituted "duress and coercion" which affected the plaintiff's rights, sought declaratory and injunctive relief. The defendant filed a counterclaim against the plaintiff for the alleged antitrust violations and requested a jury trial. The lower courts found that the plaintiff's action presented traditionally equitable claims which were not triable by a jury, and, acknowledging the fact that resolution of such claims by the court would effectively preclude a trial by jury on common issues asserted in the defendant's legal counterclaims, struck the defendant's demand. This Court reversed. The Court observed that there would be cases where legal and equitable claims were presented in which

> the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.

359 U.S. at 510. The Court then emphasized

> that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

Id. at 510-11. This Court further observed that when mixed issues are presented the trial court is free to grant equitable remedies based on the jury verdict. *Id.* at 508.

The Court's preference for jury trials, where demanded, in actions in which legal issues are combined with equitable issues was underscored in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). There the plaintiff instituted an action for trademark infringement and breach of contract and requested traditionally equitable remedies of an accounting and injunctions. The defendant demanded a jury trial, and the district court struck its demand, holding that the action was "purely equitable," or alternatively, that any legal issues were "incidental" to the equitable issues. The court of appeals refused to vacate the district court order. This Court reversed the lower court decisions and remanded the action for a jury trial. In addressing the first ground of the district court decision, that any legal issues were "incidental" to equitable issues, this Court noted the decision in *Beacon Theatres*, and reasoned as follows:

> That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such "imperative circumstances" [which might override a party's right to jury trial], *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.

369 U.S. at 473. Addressing the separate issue of whether any legal issues were presented in view of the plaintiff's request for traditionally equitable relief, this Court

emphasized that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings" and pointed out that the underlying claims were for trademark infringement and breach of contract, both of which give rise to legal remedies. *Id.* at 477-78.

This Court again addressed this issue in *Ross v. Bernhard*, 396 U.S. 531 (1970), in the context of a shareholders' derivative action brought by stockholders of a corporation against the directors and others for breach of fiduciary duty, breach of contract, and gross negligence. The Court reasoned on the basis of its prior decisions that the Seventh Amendment preserves the right to a jury trial in all actions which could not be characterized as purely equitable or admiralty cases, " 'whatever may be the peculiar form which they may assume to settle legal rights.' " *Id.* at 533, *quoting from Parsons v. Bedford, Breedlove* and *Robeson*, 3 Pet. 433, 447, 7 L.Ed. 732 (1830). The Court elaborated:

> Under [*Beacon* and *Dairy Queen*], where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.

396 U.S. at 537-38. In a footnote, this Court explained that the "legal" nature of an issue depends on (1) the pre-merger custom in regard to the issue (in law or equity); (2) the remedy sought by the plaintiffs; and (3) "the

practical abilities and limitations of juries." *Id.* at 538, n. 10. Applying this test, the Court concluded that, although a stockholders' derivative action includes some equitable characteristics, its underlying contract and tort components render it essentially an action to enforce legal rights. Therefore, the plaintiffs were entitled to a trial by jury.

2. Even if the Claim Arises from Statute and Provides for Legal Rights and Remedies, the Seventh Amendment Nevertheless Protects the Right to a Trial by Jury

The *Ross* rationale was taken a step further in *Curtis v. Loether*, 415 U.S. 189 (1974), an action under Title VIII of the Civil Rights Act of 1969, *as amended*, 42 U.S.C. Sec. 3612, alleging that the defendants had refused to rent an apartment to the plaintiff because of her race. The district court struck the plaintiff's demand for a jury trial, and the court of appeals reversed.

On appeal, the defendants argued that the plaintiff was not entitled to a jury trial because her discrimination action was created by statute and was not recognized by the common law. The Supreme Court dismissed this contention summarily:

> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

415 U.S. at 194. The Court found that the plaintiff's action was a "legal action" under the Seventh Amendment:

> A damages action under the statute sounds basically in tort – the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law.

Id. at 196-97.

This Court has continued its trend of decisions in favor of the constitutional right to trial by jury in its later cases. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974) (where the Seventh Amendment guarantee of a trial by jury was found applicable to an action for the possession of real property); *Tull v. United States*, 481 U.S. 412 (1987) (where the petitioner was found entitled to his constitutional right to trial by jury in a civil penalties action under the Clean Water Act, 33 U.S.C. Sec. 1319(b)); and *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782 (1989) (where the Court held that the petitioner was entitled to a jury trial under the Seventh Amendment in a fraudulent conveyance action brought by a trustee in bankruptcy since the primary relief requested was that of monetary damages).

3. The Seventh Amendment Protects the Right to Trial by Jury When the Underlying Issues Include a Legal Claim

Clear principles emerge from these decisions which apply in the present context. First, *Beacon Theatres* and *Dairy Queen* emphasize that the procedural changes which came about with the enactment of the Federal Rules of Civil Procedure eliminated much of the "jurisdictional competition" between law and equity. Since the two courts became one, litigants could take all of their claims to a single court which could conduct a trial by the court and jury and could offer a full range of remedies. Accordingly, mixed issues common to equitable and legal claims should be tried by a jury, if properly demanded, except "under the most imperative circumstances," which would be extremely rare. *Beacon Theatres*, 359 U.S. at 511. Second, the determination of the "legal" nature of a claim for Seventh Amendment purposes should not depend on a semantical characterization of the overall action in traditional equitable terms, the procedural form which the action takes, or even on the primary remedy sought. Rather, the courts should focus on the nature of specific underlying issues and consider all of the remedies to which the plaintiff may be entitled in his action. Thus, historically equitable actions, such as derivative stockholders' claims, are triable by a jury, if they include underlying issues based on contract, tort, or other legal theories upon which money damages or other legal relief are sought. *Ross*, 396 U.S. 531. Finally, in accordance with the strong preference voiced by this Court for the Seventh Amendment, all doubts should be resolved in favor of a litigant's constitutional right to a jury trial.

B. SEVENTH AMENDMENT PRINCIPLES GUARANTEE A TRIAL BY JURY FOR CLAIMS FOR BREACH OF DUTY OF FAIR REPRESENTATION

While the Supreme Court has never addressed the Seventh Amendment issue in a fair representation case, the principles developed in the above cases apply tc the theories of such an action and guarantee the rights of the respondents to a jury trial on the facts of this case. The District Court and the Court of Appeals reached this conclusion. The District Court initially observed, as the parties agree, that Section 301, provides no explicit guidance as to the parties' rights to a jury trial. 29 U.S.C. Sec. 185 (1985). Noting the absence of express legislative intent, the court presented the Seventh Amendment issue in this action as follows:

> The question is not whether the rights existed at common law or were created by statute, for it is well established that the Seventh Amendment "requires a jury trial upon demand" where a statute "creates legal rights and remedies, enforceable for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194 (1974). Rather, the question is whether the rights plaintiffs asserted in their hybrid Section 301 action are legal or equitable.

667 F.Supp. at 661, Pet.App. A8-9. The District Court applied the three *Ross* factors to determine the "legal nature" of a claim, (1) the pre-merger custom, (2) the nature of the remedy sought, and (3) the "practical abilities and limitations of juries," *Ross*, 396 U.S. at 538, n.10, and determined that the respondents were entitled to a jury trial. First, the respondents are invoking a statutory

remedy under 29 U.S.C. Sec. 185, which was first recognized and later developed by the Supreme Court and which has close analogues in common law contract and tort actions. Second, the respondents, both in their pleadings and in fact, are demanding primarily legal relief. Finally, a jury is capable of finding the facts of this case upon proper instructions by the court.

1. The Underlying Issues in this Action are Legal

According to *Ross*, the first factor to be considered in determining the "legal nature" of claims is the historical treatment of such claims prior to the merger of courts of law and equity. As commentators have noted, this factor can be extremely difficult to apply to modern actions which have no precise counterpart in common law and equity.[4] The District Court in this case gave little weight to this factor, instead emphasizing the second prong of *Ross*, the nature of relief demanded. *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 676 F.Supp. at 661; Pet.App. A10. *Accord, see Curtis*, 415 U.S. 189. The Court of Appeals held that this action presents mixed legal and equitable issues which require a jury trial. *Terry*, 863 F.2d at 339; Pet.App. A51. An analysis of the specific issues of fair representation actions indicates that the legal characteristics in such actions dominate.

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[4] *See* F. James and G. Hazard, *Civil Procedure*, pp. 409-58 (3rd Ed. 1985); and Wright and Miller, *Federal Practice and Procedure*: Civil Sec. 2301 *et. seq.* (1971 and *Supp.* 1988). The Supreme Court made the same observation as it articulated the test: "Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." *Ross*, 396 U.S. at 539, n. 10.

a. The issues in Section 301 cases most closely resemble actions for legal malpractice which sound in tort and contract.

This Court's Seventh Amendment decisions demonstrate that the focus and emphasis in consideration of the first *Ross* factor should be on the specific issues themselves, rather than on any general characterization of the fair representation action. *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1984). These issues were articulated in *Vaca v. Sipes*, 386 U.S. 171 (1967), as follows: (1) whether the union has breached its statutory duty of fair representation; and (2) whether the employer has breached its contract or collective bargaining agreement with the union. In order for the plaintiff to prove breach of the duty of fair representation by the union, he must present evidence that the union's conduct was arbitrary, discriminatory, or in bad faith. *Id*. These issues raise legal questions sounding in tort and contract.

In recent decisions of the Supreme Court with respect to Section 301, in *Vaca*, *Bowen*, and *DelCostello*, this Court has recognized some resemblance to common law elements in the issues of a Section 301 case. The Court has observed that, although the fair representation action is not squarely aligned with actions for breach of contract or tort claims, Section 301 cases combine elements of such actions within the context of federal labor policy. In *DelCostello*, in fact, the Court reasoned that the "closest state-law analogy for the claim against the union" was for legal malpractice, a legal action with tort and

contract components. *DelCostello*, 462 U.S. at 167.[5] *See also, Minnis v. International Union*, 531 F.2d 850; and *Woods v. Dunlop Tire Corp.*, 673 F.Supp. 117 (W.D.N.Y. 1987).

This Court's recognition that the specific issues in a fair representation case are similar to, albeit not identical with, tort and contract theories supports the respondents' Seventh Amendment analysis. The respondents have alleged that the petitioner has committed conspiracy, willful misconduct, gross negligence and perfunctory conduct, all of which constitute a breach of its duty of fair representation to the respondents. In addition, the respondents have alleged that the employer breached its contract. While not perfect analogies, these theories support the conclusion that the enactment of Section 301 created a legal duty, and a claim for its breach is, at least in part, of a legal nature. As succinctly stated by a district court:

> NMU [the defendant union] analogizes claims for breach of the duty of fair representation to actions for breach of fiduciary duty, which are equitable in nature and which are not entitled to

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[5] Two members of the Court have made this comparison in stronger terms. *See DelCostello*, 462 U.S. at 175 (O'Connor, J., dissenting); and *United Parcel Service, Inc. v. Mitchell*, 451 U.S. at 78 (Stevens, J., concurring in part and dissenting in part). This comparison clearly is the most appropriate in the factual setting of the present case, in which the respondents' DFR claim is based, in part, on the "malpractice" of the petitioner's agent in representing them on their grievances at the hearings. Legal malpractice was historically a common law claim. *See* R.E. Mallen and J.M. Smith, *Legal Malpractice*, Vol. I, Ch. 1 (3rd Ed. 1989); and *Pitt v. Yalden*, 4 Burr. 2060, 98 Eng.Rep. 74 (K.B. 1767).

> jury trial under the Seventh Amendment. Rather than being a creature of common law or traditional equity, however the duty of fair representation is a legal duty created by statute, for enforcement of which an action lies in the courts. In actions seeking to enforce statutory liabilities involving legal rights and remedies, the Supreme Court has said, there is a right to a jury trial absent evidence of contrary congressional intent. [*Citing Curtis v. Loether*, 415 U.S. 189].

Cook v. National Maritime Union of America, 617 F.Supp. 1052, 1053 (S.D. N.Y. 1985). *See also Lucas v. Philco-Ford Corp.*, 380 F.Supp. 139 (E.D.Pa. 1974).

b. The specific issues in this case are not equitable in nature.

In its brief, the petitioner argues, based on *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), that the Section 301 action is rooted in equitable principles derived from the law of trusts. The petitioner also cites this Court's opinions in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and contends that the Section 301 action is similar to an equitable action to vacate an arbitration award.

The petitioner's attempt to convert a Section 301 action to a basic trust action is not supported by *Steele* or subsequent decisions of the Court. In *Steele*, the Court confronted a problem of blatant racial discrimination by the union against black railroad employees in contract negotiations with the employer. Sidestepping the challenge to the constitutionality of the Railway Labor Act, *as amended*, 45 U.S.C. Sec. 151 *et seq.*, on equal protection

grounds, the Court interpreted the language of the Act, in light of its purpose "to impose on the bargaining representative . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." 323 U.S. at 202-3. In the course of its statutory construction the Court observed, without citation, "a principle of general application" that one who is granted the power to act on behalf of another has the responsibility to do so in his interest. *Id.*, at 202. The Court held that the statute imposed a duty of fair representation on the union, the breach of which was actionable in the courts.

The passing observation of the *Steele* Court that one must act responsibly when acting for another does not convert the underlying issues in Section 301 cases to matters of trust law. Since *Steele* this Court has not mentioned trust principles in deciding any of the myriad of other issues which it has confronted in Section 301 cases since 1944.[6] For example, in *Foust*, the Court ruled that punitive damages were not appropriate in Section 301 cases and did not mention the trust comparison, a comparison which would have supported the rejection of this common law remedy. *See Tull v. United States*, 481 U.S. at 422 (punitive damages is a form of legal relief).

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[6] *See* the excellent presentation of the history of such actions in M.H. Malin, with L.A. Schmall, *Individual Rights Within the Union*, Chapt. 8-9 (1988). The authors conclude that "[t]he trend in authority favoring jury trials in DFR actions properly discounts the arguments based on the equitable nature of the duty of fair representation. . . ." *Id.*, at 472.

Similarly, in *Bowen*, the Court confronted the issue of the apportionment of damages between the union and the employer. The majority based its opinion on national labor policy, rejecting the readily available comparison with the law of equitable trusts.[7] In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), where the issue was the statute of limitations for Section 301 actions, the Court chose as its model the statute of limitations for setting aside an arbitration award. When the same issue was presented again in *DelCostello*, the Court reversed *Mitchell* and held that the appropriate statute of limitations was six months, which coincided with the limitations period for filing an unfair labor charge. In neither case did the Court discuss borrowing the statute of limitations for trust actions or relying on the doctrine of laches for equitable actions.

Similarly, the fact that an arbitration is sometimes involved in Section 301 cases does not convert all such claims to actions to vacate arbitration awards. First, it must be noted that not every Section 301 case involves an arbitration award or a request to vacate such an award.[8] Second, while some Section 301 actions may involve an arbitration award or a grievance committee decision, this

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[7] As stated in the petitioner's brief, in the dissenting opinion in *Bowen*, four members of this Court raised the comparison as a potential basis for deciding the issue of apportionment of damages. *Bowen*, 459 U.S. at 243. *See*, Br. of Pet., p. 19, n. 7.

[8] Indeed, as argued in the *Amicus Curiae* Brief of the Teamsters for a Democratic Union, there is a vast and fundamental difference between the grievance committees appointed by the company and union pursuant to the grievance procedure in this case, and an impartial arbitrator.

Court has noted that proof of the specific issues in the case "removes the bar of the finality provisions of the contract." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Thus, the "setting aside" of the decision is automatic upon meeting the *Vaca* standards.[9] In any event, while the Court drew a parallel in *Mitchell* to such an action for statute of limitations purposes, it reversed its decision in *DelCostello*, indicating the limited significance of the comparison.

These cases illustrate that the Section 301 action can be likened to a variety of actions both at law and equity.[10]

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[9] In the lower courts the petitioner advanced this argument under the second part of the *Ross* test, contending that any damage claims were incidental to the respondents' action to vacate the grievance committee decision. The District Court rejected this contention in terms which are pertinent to the present argument:

> Plaintiffs' goal is not to overturn the Joint Bi-State Grievance Committee's arbitration ruling, and in light of McLean's present condition they certainly do not want another crack at arbitration. What plaintiffs do want now is money to replace what they believe they lost because of the wrongdoing of their employer and their Local 391.

676 F.Supp. at 664-5; Pet.App. A25. *See also, White v. Anchor Motor Freight, Inc.*, 683 F.Supp. 117.

[10] Various analogies have been made by the lower courts, none of which "has provided much protection for the individual employee." *See* J.E. Sanchez, "Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-Up Doctrine in the Guise of Inseparability and other Analytical Problems," 38

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While the Court has drawn upon several comparisons for various purposes, no one analogy has been used consistently for all purposes. To argue that the similarity of a general Section 301 action to a particular equitable action renders all issues in the case equitable for Seventh Amendment purposes grossly exaggerates the significance of the Court's past comparisons.

The primary flaw in the petitioner's general characterization of the fair representation action as "equitable," therefore, is its failure to address the specific issues in such a case. The Supreme Court decisions on the Seventh Amendment, both in their analysis and application, emphasize that the focus should be on the specific issues in the case, particularly where the action in question is of statutory origin and has no precise counterpart in pre-merger law or equity. In fact, in each of the four cases discussed above, *Beacon Theatres, Dairy Queen, Ross* and *Curtis*, the Court expressly avoided any general description of the actions involved, stating emphatically that the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Ross*, 396 U.S. 538. Applying this rationale, the Court found in *Beacon Theatres*, that however the action was described, there were mixed legal and equitable issues presented by both parties which required

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DePaul L.Rev. 627, 649-50 (1989). This has led Professor Sanchez to conclude that the courts should drop the "futile search for the true nature of the hybrid action, or of its components in non-hybrid suits," and focus Seventh Amendment analysis on the second part of the *Ross* test, the nature of the relief sought. *Id.*, at 683.

a trial by jury on common issues of fact. 359 U.S. at 510. In *Dairy Queen*, the Court held that the plaintiff's characterization of its action as one for an accounting and injunctive relief was not dispositive of the Seventh Amendment issue, since the underlying issues of the action involved breach of contract and trademark infringement for which money damages could be recovered. The Court held that the defendant had the right "to have a jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is." 396 U.S. at 479. In *Curtis*, the Court analyzed the statutory civil rights action for housing discrimination and found that the issues were akin to common law tort actions for breach of duty of innkeepers, defamation, and intentional infliction of emotional distress. 415 U.S. at 195 n. 10.

Finally, in *Ross*, this Court directly addressed the argument advanced by the petitioner in this case. The primary action was a shareholders' derivative action. The Court recognized that such an action was traditionally equitable in pre-merger days. 369 U.S. at 534. However, this Court reasoned that under the facts of *Ross*, the "heart of the action is the corporate claim," which includes legal issues. 369 U.S. at 539. Significantly, the Court upheld the parties' right to a jury trial based on allegations of breach of contract and gross negligence, notwithstanding the allegations of breach of fiduciary obligation. *Id.*

As in *Ross*, it is misleading under Seventh Amendment principles to characterize this case as an "equitable" action. As the Court noted in *Ross*, the duty of a director

of a corporation to its shareholders is a fiduciary obligation rooted in equity. While the connection to equity is not nearly so strong in the Section 301 action, the petitioner argues that it is reason to deny the respondents' constitutional rights to a trial by jury. As in *Ross*, this Court should look beyond this characterization, and consider the specific issues in this case. Because these issues resemble common law issues, the first factor of the *Ross* test weighs clearly in favor of the respondents.

2. The Plaintiffs in this Action for Breach of Duty of Fair Representation Seek Legal, Not Equitable, Relief

Under the second prong of the *Ross* test, the determination of the "legal" nature of a claim depends on the nature of the relief requested. The nature of a claim will be viewed as legal if the remedies are considered legal. In their Complaint, the respondents have requested legal relief of lost wages, employment benefits, and moving expenses; as well as equitable relief of reinstatement and other injunctive relief. The District Court recognized that the respondents seek a combination of traditionally legal and equitable remedies. *Terry*, 676 F.Supp. at 661; Pet.App. A10-11. However, as noted by the court, intervening circumstances of the employer's bankruptcy rendered the equitable relief of reinstatement impossible. *Id.* Thus, the only remaining remedies respondents seek from the Union are legal in nature. Therefore, since the respondents seek legal remedies, *Dairy Queen*, *Beacon Theatres*, *Ross*, and *Curtis* require that the respondents' rights to a jury trial be upheld.

a. Backpay is generally monetary relief which flows directly from a legal wrong.

Prior to the merger of equity and law, the remedies and relief offered by each court, while somewhat overlapping, had distinguishing characteristics. Legal relief included most claims for compensatory money damages and was relatively fixed, as a matter of right, upon proof of the wrong. J.N. Pomeroy, *A Treatise on Equity Jurisprudence*, Vol. I, Sec. 109 (5th Ed. 1941). Thus, the compensation principle, under which an individual is to be compensated for actual losses, is primarily a product of the common law. J. Story, *Commentaries on Equity Jurisprudence*, Vol. II, Sec. 794 (6th Ed. 1853). *See also Illinois Central R. Co. v. Crail*, 281 U.S. 57 (1930). Remedies granted by the equity courts, in contrast, were distinguished from legal remedies by "their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use." J.N. Pomeroy, *supra*, Sec. 109, at 141. Generally, at equity, money judgments were only allowed when incidental or ancillary to traditional equitable relief. J. Story, *supra*, Sec. 794, at 133.[11]

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[11] The commentator explains this principle as follows:

> "It may be stated, as a general proposition, that, for breaches of contract, and other wrongs and injuries, cognizable at law, Courts of Equity do not entertain jurisdiction to give redress by way of compensation or damages, where these constitute the sole objects

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b. The Supreme Court has recognized the legal nature of relief in Section 301 actions.

While this Court has not characterized backpay in Section 301 actions, it has recognized the wide range of legal and equitable remedies available in such actions. In *Vaca* the Court, reviewing a jury award of damages for the plaintiff's backpay, approved mixed remedies for Section 301 violations, including "appropriate damages *or* equitable relief." 386 U.S. at 196 (emphasis provided). In *Foust*, this Court reviewed a jury's award of punitive damages. The Court concluded that the "compensation principle" in *Vaca* was limiting in that it precluded punitive damages which, by definition, are in excess of actual compensatory damages. The Court reaffirmed *Vaca*'s declaration that "[t]he fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights," and specified that "damages *and* equitable relief could be awarded when necessary *to ensure full compensation.*" 442 U.S. at 48-9 (emphasis provided). In a third case discussing damages, *Bowen*, this Court considered the proper apportionment of compensatory damages between the union and the employer. The Court held the union liable for damages caused by its breach of duty, describing compensatory

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of the bill. *For, wherever the matter of the bill is merely for damages, and there is a perfect remedy therefor at law, it is far better that they should be ascertained by a jury than by the conscience of an Equity judge."*

Story, *supra* p. 29, Sec. 794 at 133.

damages as "limited and finite," characteristics of common law relief. 459 U.S. at 227, n. 16. *See also Hines*, 424 U.S. at 562 ("Section 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge").

This Court's discussion in the above cases is important for several reasons. While the statute itself, Section 301, is silent with respect to remedies, its interpretation by the Court is clear: an individual who can prove a wrong under the *Vaca* standards has a right to an award of legal relief in the form of actual compensatory money damages, and is also entitled to consideration of equitable relief by the court. Although the Court's language seems plain, the petitioner contends, in effect, that relief under Section 301 is part of a general equitable scheme of remedies which is all, apparently, discretionary with the court. *See* Br. of Pet., p. 24. In characterizing the remedial scheme of Section 301 in this manner, the petitioner attempts to draw support from two statutes or statutory schemes to which equitable principles have been applied. *See* Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. Sec. 2000e *et seq.*; and the National Labor Relations Act, *as amended*, 29 U.S.C. Sec. 151 *et seq.*

c. Backpay is generally a legal remedy, and the statutory language and policies of Title VII and the NLRA render those statutes inapposite to this conclusion.

Neither Title VII nor the National Labor Relations Act gives reason to deny the respondents' constitutional rights to a jury trial in this Section 301 case. With respect

to Title VII, there are critical distinctions, both in the statutory language and in the underlying policy, which make it a particularly inappropriate comparison. Where the statutory language of Section 301 is silent as to remedies, the Congressional intent and policy behind Title VII is strikingly clear. The pertinent statute under Title VII, 42 U.S.C. Sec. 2000e-5(g), states that the court, upon proof of discrimination, "*may* enjoin the respondent" and "order such affirmative relief as *may* be appropriate, which *may* include . . . reinstatement . . . with or without backpay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. Sec. 2000e-5(g) (emphasis provided). Courts construing or relying on this Title VII language have held backpay to be discretionary with the courts and incidental to reinstatement, and thus, equitable relief. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (Title VII case); *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

In view of this language, it is reasonable to conclude that under Title VII backpay is a form of equitable relief which can be, but does not have to be, granted as an incident of the equitable remedy of reinstatement in the exercise of the discretion of the court. *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). Many courts have reached this conclusion over the

years, and some have denied jury trials in Title VII actions on that basis.[12]

Courts have found additional support in the substantial legislative history of Title VII in characterizing all remedies under that section as equitable. At the time of the enactment of Title VII, Congress was principally concerned with juror bias, especially in the South, which could emasculate the remedial purposes of the Act. *See, e.g.*, 110 Cong. Rec. 8660 (Remarks of Senator Humphrey) (1969). On numerous occasions, in fact, Congress considered and rejected proposed amendments to grant parties the right to a jury trial in actions brought under Title VII. *See, e.g.*, 110 Cong. Rec. 14,182 (1964) (Senate rejected amendment offered by Senator Thurmond to make violations of Title VII subject to jury trial). Simply put, the legislative history behind Title VII illustrates that Congress was decisively opposed to jury trials in Title VII cases and drafted the statute specifically limiting remedies to those of an equitable discretionary nature, in order to effectuate its intent.

Obviously, there is no similar language in Section 301 and there is no policy either in the legislative or judicial history of Section 301 to avoid jury trials in these cases. As the Court of Appeals recognized in this case, Congress

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[12] *See, e.g., Johnson v. Georgia Highway Express, Inc., supra. Compare,* however, *Beesley v. The Hartford Fire Insurance Co.*, No. 89-AR-1062-S (N.D.Ala. August 14, 1989) (available August 14, 1989 on LEXIS, Genfed library, Dist. file), where a district court has recently recognized a right to a jury trial in Title VII cases based on the Court's latest Seventh Amendment decisions.

did not expressly provide for either legal or equitable relief when enacting Section 301. *Terry*, 863 F.2d at 339; Pet.App. A50. Thus, this Court's response to a similar argument in *Curtis* is pertinent:

> [T]he statutory language on which this characterization [of backpay as an equitable remedy] is based . . . contrasts sharply with Section 812's [of Title VIII] simple authorization of an action for actual and punitive damages. In Title VII cases, also, the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount. . . . Whatever may be the merit of the "equitable" characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief.

415 U.S. at 197.

Neither is there any legislative history behind Section 301 which reveals any Congressional fear of juror prejudice that would seriously impede the enforcement of the statute. And in the development of the fair representation action, which stems from Section 301, this Court, as shown above, has recognized and, in fact, reviewed awards of legal and equitable relief. In these decisions, the Court has imputed to Section 301 what is express in similar statutes in which backpay is clearly considered legal relief. *See* Age Discrimination in Employment Act, *as amended*, 29 U.S.C. Sec. 621 *et seq.* (where the statute providing for remedies in age discrimination cases provides for "legal or equitable relief," 29 U.S.C. Sec. 626(c));

the Fair Labor Standards Act, 29 U.S.C. Sec. 201 *et seq.* ("any employer who violates [the Act] shall be liable for such legal or equitable relief . . . ," 29 U.S.C. Sec. 216(b)); and *Lorillard v. Pons*, 434 U.S. 575 (1978).

The National Labor Relations Act is equally inapposite to the petitioner's challenge of the respondents' rights to a jury trial. The petitioner has implied that the policies underlying the Act – to establish a national labor policy and to promote the private adjustment of contract disputes – also form the bases for Section 301; and that, therefore, the equitable and discretionary remedial scheme which is generally administered by an arbitrator or the Board under the Act should be imputed to the court in Section 301 cases.

It is true, of course, that our national labor policy was established in the Act and is involved in Section 301 actions before the courts. Thus, in developing principles and rules in Section 301 actions, the courts have considered the potential impact of their decisions on national labor policy. This has been particularly true when this Court has confronted the broader questions with potentially far-reaching effects on labor policy under the Act.[13]

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[13] Thus, in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court required exhaustion of claims under the grievance procedure of the collective bargaining agreement in order to promote the private adjustment of disputes, which is favored under the Act. In *Vaca*, the Court, while recognizing the importance of the judicial action, established a relatively high standard of proof for individuals seeking to avoid an unfavorable grievance decision for the same reason.

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The petitioner attaches extraordinary significance to the observation that the Court has been mindful of national labor policy when interpreting Section 301. From this truism, the petitioner leaps to the conclusion that all relief under the Act is remedial. However, it does not follow, as the petitioner essentially contends, that the courts should be limited to equitable relief or that the remedial scheme should correlate precisely with that of arbitration or the Board under the National Labor Relations Act. The fact that the Court has been influenced by national labor policy is no more dispositive of the issue in this case than the fact that housing discrimination actions under Title VIII in *Curtis* were a creature of civil rights legislation, and thus aligned in general purpose with Title VII. The question in this case is whether backpay is legal relief which follows as a matter of right upon proof of wrongdoing under the *Vaca* standards; or whether such relief should be discretionary with the judge, even in the absence of any Congressional intent to make it discretionary, and treated as an equitable remedy, along with reinstatement and injunctive relief. In its extended discussion of the policies of the NLRA, the petitioner fails to explain

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In *Foust*, the Court in its decision to eliminate punitive damages in Section 301 actions, was influenced by the perceived impact on "union treasuries" if juries were allowed to award such damages which are, "unpredictable and potentially substantial." *Foust*, 442 U.S. at 50. In *Bowen*, the court considered the signal which might sound to unions if they were not held responsible for any of a plaintiff's damages, and apportioned such damages in a manner consistent with the majority's view of national labor policy.

how jury determinations of Section 301 cases would undermine such policies.

This Court has emphasized that the actions under Section 301 and NLRA are not identical and should not be subject to the same rules and procedures. Indeed, at the very foundation of the *Vaca* decision that fair representation actions are not pre-empted by National Labor Relations Board jurisdiction was the recognition that individual interests are subordinated in Board actions and that the judicial action under Section 301 is needed as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law," 386 U.S. at 182. For good reason, then, the Court established an identity for the Section 301 action with its own separate policy and philosophy, emphasizing compensation to the individual. In *Foust*, this principle was explained in the context of the different policies of the two actions:

> The compensation principle is also reflected in *Vaca's* refusal to hold unfair representation claims within the exclusive jurisdiction of the National Labor Relations Board. Because the "public interest in effectuating the policies of the federal labor laws, *not the wrong done the individual employee*, is always the Board's principal concern in fashioning unfair labor practice remedies," we feared that denial of a judicial forum might "frustrate the basic purposes underlying the duty of fair representation." *Vaca v. Sipes, supra*, at 182, n. 8, 183, 87 S.Ct. 913 n. 8 (emphasis added). *See also, Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324, 328-329, 89 S.Ct. 548, 550-551, 21 L.Ed. 2d 519 (1969).

442 U.S. at 49, n. 12.

This fundamental difference between the purposes of the National Labor Relations Act and Section 301 actions is critical to the issues in this case. In Section 301 actions the focus is and should be on the individual, with a strong emphasis on compensation for any actual damages sustained as a result of the wrongdoing of the union and employer. Such damages, including backpay, should flow as a matter of right from a proven wrong. This Court said as much when, in discussing the employer's liability in fair representation actions, it observed that "the employer discharged the employee wrongfully and remains liable for the employee's backpay." *Bowen*, 459 U.S. at 223. *See also Minnis*, 531 F.2d at 852, where the Eighth Circuit Court of Appeals concluded that "damages resulting from a breach of duty of fair representation do not fall within a discretionary category but may be recovered as of right." Since compensatory damages are normally "limited and finite," they should be easily calculable by a jury under proper instructions from the court. And since backpay compensates the plaintiff for actual economic injury, it does not raise the same concerns which led to the rejection of punitive damages in such actions in *Foust*. In fact, it is inconceivable that jury determinations of backpay could in any way threaten or compromise our national labor policy.

Given the independent nature of Section 301 actions, courts and juries need not mimic labor arbitrators or the National Labor Relations Board in remedying the effects of breaches of the duty of fair representation and of the

collective bargaining agreement.[14] Indeed, if that were the case, there would be little need for an independent judicial action and Section 301 actions would be reduced, essentially, to actions to compel arbitration. This Court in *Vaca* expressly rejected the view that the courts should "inflexibly . . . require arbitration in all cases," pointing out that the range of remedies of an arbitrator is not necessarily the same as the judicial remedies under Section 301; that "the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy," and that in such cases "the court should be free to decide the contractual claim and to award the

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[14] The petitioner essentially contends just that. *See* Br. of Pet., 28-31. There are, of course, a number of factual reasons why neither the court nor a jury could or should exercise the original discretion of the grievance committee. The first problem lies in the passage of time, which the respondents contend was due to the fault of the petitioner. With the passage of time has come critically changed circumstances, particularly in the bankruptcy of the employer. Thus, there is no way to duplicate the circumstances which prevailed at the time of the original committee hearing. Finally, and perhaps most important in this case, the backpay requested by the respondents resulted, for the most part, from the failure of the committee to find a "subterfuge" in the employer's recalls of February 8, 1983. If the committee had upheld the respondents on this issue, the respondents' backpay which is the subject of this analysis would have been minimal, since they would have been reinstated to their special seniority positions. *See* Statement of Case, *supra*. Thus, the substantial part of the backpay which is at issue in this case, and which resulted from the failure of the committee to enforce the change of operations procedure, was not at issue at the time of the hearings.

employee appropriate damages or equitable relief." 386 U.S. at 196. Significantly, the *Vaca* Court did not view the Board's (and presumably, the arbitrator's) "expertise" as critical in fair representation cases. *See Vaca*, 386 U.S. at 181.[15]

In sum, the fact that the Court has established a distinct role for Section 301 actions, and has recognized a wide range of legal and equitable remedies, demonstrates the independence of this action in every respect. Accordingly, the attempts of the petitioner to bind the forms and procedure of the Section 301 actions to other actions is inconsistent with the principles articulated by this Court in *Vaca* and subsequent decisions, and intrudes upon the fundamental rights guaranteed by the Seventh Amendment. As one commentator reasoned:

> Once the Court decided that a DFR plaintiff has a choice of forum, that plaintiff should not be denied a major characteristic of the forum selected, a right to jury trial, nor should that

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[15] The Court made the following observation which is particularly pertinent to the facts of this case:

> [B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

Vaca, 386 U.S. at 185. *See also* Brief for Teamsters for a Democratic Union as Amicus Curiae Urging Affirmance, filed in this case.

> plaintiff be able to avoid that characteristic where a jury trial is demanded by the defendant.

Malin and Schmall, *supra* p. 25, at 472.[16]

Thus, in the absence of any statutory language limiting available remedies, and in view of the principles articulated by this Court in favor of compensation to the individual, backpay should be considered an element of legal relief. In addition to the *Terry* courts, other courts have apparently reached this conclusion. *See Cox v. H.*

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[16] The other bases on which some courts, primarily in Title VII actions, have found backpay to be equitable and discretionary are not applicable to this case. For example, some courts have viewed backpay as a form of specific performance or restitutionary relief, which is equitable in nature. *See Equal Employment Opportunity Commission v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975). In this case, there has been no unjust enrichment to the employer or to the petitioner which would warrant a restitutionary recovery. As the District Court noted in its opinion: "Back pay represents wages plaintiff was deprived of the opportunity to earn, not money he actually worked for that was withheld from him." 676 F.Supp. at 663, Pet.App. A16. Other courts have classified backpay as incidental to reinstatement and thus equitable. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (Title VII case); *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1975). Obviously, in the absence of the statutory language of Title VII or some similar statute, the fact that backpay is "incidental to equitable relief" does not make backpay equitable for Seventh Amendment purposes. *Beacon Theatres*, 359 U.S. 500. *See Sanchez, supra* p. 25-6 n. 10, at 652-3 n. 157. In any event, in view of the employer's demise in this case, reinstatement is not possible. Therefore, whatever the validity of this argument under Seventh Amendment analysis, it is not applicable to this case.

Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979); and *Minnis v. International Union*, 531 F.2d 850 (8th Cir. 1980); and discussion of these cases in *Terry*, 676 F.Supp. at 662-3; Pet.App. A15-17.

In accordance with established rules of statutory construction, a review of other statutes which are silent as to relief reveals that courts have generally treated backpay as an element of legal relief. Sutherland, *Statutes and Statutory Construction*, Sec. 50.04, 53 (1987). For example, in considering this issue in an action under 42 U.S.C. Sec. 1983, the First Circuit Court of Appeals stated the following:

> Unlike the calculations required to assess the civil penalty in *Tull*, the computation of back pay normally requires only the addition (or multiplication) of a fixed sum. To paraphrase *Tull*, these are the kinds of calculations traditionally performed by juries. [Citation omitted]. Our analysis leads us to conclude that the determination of back pay as a factor of compensatory damages involves the substance of a common-law right to a trial by jury.

Santiago-Negron v. Castro-Davila, 865 F.2d 431, 441 (1st Cir. 1989). Moreover, backpay has consistently been considered an element or component of legal compensatory money damages at common law. *Hollwedel v. Duffy-Mott Co., Inc.*, 188 N.E. 266, 269 (N.Y. 1933) (the compensatory damages equalled what the employee lost for "not being permitted to work"); *Godson v. MacFadden*, 39 S.W.2d 287, 288 (Tenn. 1931); *Santiago-Negron v. Castro-Davila*, 865 F.2d at 441 (where the court stated: "In tort actions for personal injury tried to a jury, lost wages are invariably treated as being part of compensatory damages"). *See also*

Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981) *cert. denied*, 454 U.S. 1064 (1981) (citing common law cases involving employment relationships where juries traditionally computed backpay as a measure of legal damages).

Based on the above principles, backpay, along with the other compensatory damages sought in this action, is legal relief. Conversely, there is no reason, either statutory or otherwise, why backpay should be considered equitable. Since Congress did not include backpay as a discretionary or equitable remedy under Section 301, such relief, as in common law, remains a form of compensatory money damages, which is legal relief. And with respect to issues concerning such legal relief, this Court has held consistently for three decades that a plaintiff's constitutional right to a jury trial is preserved.

The Fourth Circuit's following conclusions in the present case are based on sound rationale and should be upheld:

> [B]ackpay, as a form of money damages, may appropriately be considered legal in nature. Thus, although a Section 301 action to remedy a violation of a collective bargaining agreement has no counterpart in common law, in our view, the claims for damages asserted here involve legal issues, and, like the Supreme Court in *Curtis*, we find no functional justification for denying the jury-trial right. [Citations omitted].
>
> We review the duty of fair representation increment of the hybrid action in the same light. Like its Section 301 sibling, it is derived from congressional enactment, albeit by judicial interpretation of the statute. *See, e.g., Vaca*, [Citation

omitted]. Further in *DelCostello*, the Supreme Court noted that "the closest state-law analogy" to this action is a state tort malpractice action. [Citation omitted]. In our view, this component of the action is also legal in nature.

As we have indicated, we are unable to structure a bright-line rule stating which specific issues in hybrid Section 301/duty of fair representation cases are subject to the Seventh Amendment requirement of a jury trial. We hold instead that, although many aspects of this action are intertwined, presenting both equitable and legal issues, either party is entitled to a jury trial of identifiable legal issues. We think the dictates of *Beacon Theatres*, *Dairy Queen*, and *Curtis* require that result. . . .

863 F.2d at 339, Pet.App. at A50-51.

3. The Issues Raised in this Action are Issues Typically Entrusted to Juries

Finally *Ross* directs that the practical abilities and limitations of the jury in a fair representation case be considered.

The petitioner has not presented any argument with respect to this factor and indeed, in the most recent Seventh Amendment decisions, this Court has not mentioned it. *See Tull*, 481 U.S. 412. At any rate, the lower courts appropriately dismissed the petitioner's contention below that a jury would not be capable of deciding this case. The District Court noted that there were measures that could be taken to accommodate any such anticipated difficulties and in fact ordered that the issues of liability and damages be bifurcated to accommodate such

concerns. 676 F.Supp. at 665, Pet.App. A28. The experience of the courts with jury trials in Section 301 cases demonstrates that juries, with appropriate instructions from the courts, are quite capable of deciding the issues Section 301 cases.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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